

October 12, 2010

The Question

I have two questions regarding the application of Rules 10.220 and 10.370(c) in the course of conducting court-ordered small claims mediation.

Rule 10.220 states that one of the roles of a mediator is to “assist in the identification of issues and exploration of alternatives.” Rule 10.370 (c) states, in part, that “a mediator shall not offer a personal or professional opinion intended to coerce the parties, unduly influence the parties, decide the dispute, or direct a resolution of any issue.”

Question One: Does this Rule 10.220 give the mediator the ability to suggest with specificity [*emphasis added*] possible settlement alternatives or is the offering of suggesting settlement alternatives a violation of Rule 10.370(c)? It should be noted that the elements of settlement alternatives were not raised by either party, but were solely those raised by the mediator.

Question Two: Would your response depend on whether the suggestions were made by the mediator during caucus?

Your opinion would be greatly appreciated.

Certified County and Family Mediator
Northern Division

Authorities Referenced

Rules 10.220, 10.310, 10.330, 10.370, 10.370(c), Florida Rules for Certified and Court-Appointed Mediators

Summary

Answer to Question One: A mediator may discuss and “*explore settlement alternatives*” with the parties as long as the activities by which the mediator does so is consistent with the Rules for Certified and Court-Appointed Mediators.

Answer to Question Two: The answer to question one above does depend on whether the mediator was in caucus with the parties.

Opinion

Answer to Question One: A mediator may discuss and “*explore settlement alternatives*” with the parties for their consideration in accordance with the role of the mediator as defined in Rule 10.220 as long as the activities by which the mediator does so is consistent with Rules 10.310 (Self-Determination) and 10.330 (Impartially) and does not violate Rule 10.370 (Advice, Opinions or Information). The mediator must assess the interaction of the parties, their demeanor during the mediation and whether making such “suggestions” would be inferred as intimidation or coercion by the parties. The Committee recommends using the tool of “open ended questioning” may be preferable to making specific suggestions.

In answering your specific question, the MEAC considered that the word “suggestion” may be interpreted or defined by mediators differently and therefore, the MEAC believes that it’s prudent to offer examples of appropriate and inappropriate ethical conduct below.

Examples:

A mediator may ask a party the question “Have you considered the possibility of [*specific settlement alternative*] as meeting the needs and objectives that you are seeking?” Asking a party a question which prompts them to consider a specific settlement alternative “suggestion” in this manner is appropriate and consistent with concepts of impartiality, party self-determination, and the appropriate role of the mediator.

A mediator who makes an affirmative statement to a party such as, “You should consider [*specific settlement alternative*] as the best alternative presented here today” would be engaging in inappropriate conduct as the specific settlement alternative “suggestion” in this example is a statement intended to “direct a resolution of any issue” which is prohibited under Rule 10.370(c), Personal or Professional Opinion, and inconsistent with the concepts of impartiality and party self-determination.

Answer to Question Two: The answer to question one above does depend on whether the mediator was in caucus with the parties. A mediator must exercise greater caution in joint session when making suggestions for resolution alternatives not to appear partial to one party or the other. Asking such questions in joint session can potentially lead to a perception of partiality of the mediator. The more cautious approach would be to explore settlement options in caucus unless the parties or their attorneys are making the suggestions themselves in joint session.

Date

Beth Greenfield-Mandler, Committee Chair